A

YAP KIM LEW

v.

PEH THYE MENG

B

HIGH COURT MALAYA, MUAR
UMI KALTHUM ABD MAJID J
[PETITION DIVORCE NO: 33-157-2011]
8 OCTOBER 2012

C ***FAMILY LAW:*** *Maintenance - Wife - Whether wife failed to justify maintenance sum sought - Whether wife embezzled monies from husband's business to enrich herself - Wife failed to make full and frank disclosure of financial status and earnings to Court - Whether wife by avaricious conduct and approval of husband's extra-marital relationship caused*
D *breakdown of marriage*

The petitioner/wife herein sought orders from the High Court to have her marriage to her used-car dealer husband ('the respondent') dissolved; for him to pay her RM3,000 monthly as maintenance and for her to be given half the value of all properties
E acquired during the marriage and half the monies the respondent held in his bank accounts. The petitioner also wanted the respondent to pay her RM5,000 yearly as "ang pow" for Chinese New Year. The couple had five children who were all above 18 years of age. About 13 years after their marriage, the petitioner
F gave her "consent and blessings" to the respondent to take a clerk ('SR2') who was working in the respondent's firm as his "second wife" on a condition (to which the respondent agreed) that the petitioner be given management and control over his business finances and accounts. It was in evidence that over the 16 years
G she was in charge of the firm's finances, the petitioner had not only embezzled the daily cash takings but also commissions from the sales of insurance. The respondent had five children, aged between nine and 22 years, with SR2. The eldest child died, the youngest was handicapped and needed special attention and all
H the surviving children were either schooling or in college.

I

Held (ordering dissolution of marriage, and for respondent to pay petitioner RM1,500 as maintenance and RM22,500 as her share in acquisition of a matrimonial asset; dismissing all other claims):

(1) The petitioner was solely responsible for the breakdown of the marriage. She admitted to approving of the respondent's relationship with SR2 and could not now fault him for it. Apart from referring to that relationship she did not lead any evidence to show the respondent had caused the marriage to breakdown. On the other hand, the petitioner had acted irresponsibly towards the respondent's company until it had overdrawn its overdraft account forcing the respondent to ask SR2 to take charge of the company's affairs. (paras 32-35)

(2) A sum of RM1,500 monthly was reasonable maintenance of the petitioner. While she had only herself to maintain, the respondent had a young second family to support and maintain from his union with SR2. The petitioner failed to adduce any evidence to support her claim for RM3,000 maintenance. (paras 13, 26 & 36)

(3) The petitioner earned quite large sums of money from the respondent's company, but failed to give evidence of her monthly/weekly expenditure or make any disclosure of her financial status. Her failure to make full and frank disclosure compelled the court to invoke adverse inference against her under s. 114(g) of the Evidence Act 1950. (para 23)

(4) Apart from the acquisition of one landed property, the other landed properties and monies held in the respondent's bank accounts were acquired or earned by him by his own efforts. It was most unreasonable of the petitioner to demand her so-called half share of the monies but at the same time not be prepared to bear her half share of the liabilities incurred. (paras 42, 43, 50, 56, 57 & 60)

Case(s) referred to:

Ching Seng Woah v. Lim Shook Lin (F) [1997] 1 CLJ 375 CA ***(refd)***

Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA ***(refd)***

Koay Cheng Eng v. Linda Herawati Santoso [2008] 4 CLJ 105 CA ***(refd)***

Sivanes Rajaratnam v. Usha Rani Subramaniam [2002] 3 CLJ 300 CA ***(refd)***

Tan Hood Keng v. ARP Aroonasalam Chetty [1912] 1 LNS 2 CA ***(refd)***

A **Legislation referred to:**
Evidence Act 1950, s. 114(g)
Law Reform (Marriage and Divorce) Act 1976, ss. 53, 76, 78

For the petitioner - Alex Tan Jee Hian; M/s Jublin Tan & Tey
For the respondent - Pang Hok Liong; M/s CC Aiyathurai & Co
B

Reported by Ashok Kumar

JUDGMENT

C

Umi Kalthum Abd Majid J:

The Petition

D **[1]** The petitioner wife applied for the following orders:

(i) her marriage to the respondent be dissolved under s. 53 of the Law Reform (Marriage and Divorce) Act 1976 ("the Act");

E (ii) maintenance of RM3,000 be paid to the petitioner as per the Judicial Separation Order dated 25 November 2010 given under case No. 33-97-2010 ("the Separation Order") until the petitioner dies or remarries;

F (iii) all the properties acquired during the marriage between the petitioner and the respondent be equally divided between the parties or alternatively for all such properties be sold at market value and be equally divided between the parties less all costs of the sale;

G (iv) the respondent to pay to the petitioner in equal shares the profits obtained from the sale of the properties acquired by the respondent during the marriage and sold before this petition was filed;

H (v) the respondent to divide in equal shares all monies held in banks and obtained during the subsistence of the marriage to the petitioner within three months from the date of the *decree nisi*;

I (vi) the respondent to pay to the petitioner RM5,000 per annum towards her Chinese New Year celebration until the petitioner's death or remarriage;

(vii) the respondent to pay to the petitioner general and exemplary damages with regard to the respondent's extra marital relationship with a third party, which damages are to be assessed; and

(viii) the respondent to pay costs to the petitioner.

The Facts

[2] The following facts are agreed/not disputed. The petitioner and the respondent were lawfully married on 29 June 1978 through Chinese customary rites. They have five children who are all above 18 years of age.

[3] The respondent has five other children with one Lee Miau Tan (SR2) outside of wedlock. The children with SR2 are aged between nine years to 22 years. The eldest child had passed away while the remaining four children are still schooling and/or in college. The youngest daughter by the name of Peh Mei Yuan, aged nine years, is suffering from some disabilities and has been categorised as "orang kurang upaya" or OKU. She needs special attention.

[4] *Vide* the separation order, which was entered by consent of the parties, the petitioner and the respondent are legally separated and the respondent is required to pay the sum of RM3,000 a month to the petitioner for her maintenance, which payment is to made into the petitioner's account in Am Bank (M) Bhd on or before the third of each month. The respondent has been paying the said amount to the petitioner since November 2010. Notwithstanding the separation order, the parties have been living separately since 2007 when the respondent left the matrimonial home.

[5] The petitioner did give her consent and blessing to the respondent to take SR2 as his "second wife" on 1 March 1991 upon the conditions that:

(i) all parties must live together;

(ii) the petitioner shall manage and control the respondent's company's finances and also the cash and company accounts and all daily collections (p. 10, notes of Evidence).

[6] The respondent is the sole proprietor of the business trading as Nam Hin Motor Trading which deals in the buying and selling of used cars (pp. 13-14(b), (c) as of 11 March 1990 ("the company").

Preliminaries

[7] During the cross-examination of the petitioner/SP1, the petitioner's learned counsel stated that he wished to withdraw the petitioner's prayer on general and exemplary damages. That being the case, the petitioner is now precluded from making such a claim and I disallow this claim of the petitioner's.

[8] As both the petitioner and the respondent prayed that their marriage be dissolved, I so grant prayer 15(a) of the petitioner's petition as well as prayer 13(a) of the respondent's counter petition.

[9] This leaves only three issues which are contested by the parties. They are:

(i) the maintenance of the petitioner;

(ii) division of the matrimonial assets;

(iii) the annual sum of RM5,000 for the petitioner's Chinese New Year celebration.

Petitioner's Maintenance

[10] The petitioner contended that the respondent did not dispute the maintenance sum of RM3,000 per month. Whereas the respondent had pleaded in para. 8 of the reply and counter petition that the said sum was recorded pursuant to a consent order (in the form of the separation order), meaning to say that the respondent is contesting the said sum of RM3,000.

[11] According to the respondent he had agreed to the said sum in order to avoid the petitioner from creating scenes every day at his place of business (Q & A 51, R2). The respondent's evidence was not challenged by the petitioner.

[12] Before I go further, reference must be made to the provisions of s. 78 of the Act pertaining to the assessment of maintenance as follows:

> **In determining the amount of any maintenance to be paid by a man to his wife** or former wife or by a woman to her husband or former husband, *the court shall base its assessment primarily on the*

> *means and needs of the parties*, regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, *but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage*. (emphasis added).

It is essential to remember that s. 78 refers to the "means and needs of the parties", that is, not only the needs and means of the wife but also the needs and means of the husband. The court has to also take into consideration the principles laid down in the Court of Appeal case of *Koay Cheng Eng v. Linda Herawati Santoso* [2008] 4 CLJ 105, amongst others, that the petitioner is to be placed in a position to enjoy the same standard of living as she had during the existence of the marriage. Per Hashim JCA (as he then was) at p. 118, paras. 25, 26:

> [25] We are of the view that with the standard and cost of living of the respondent, the sum awarded is justifiable. We are in agreement with the learned counsel for the respondent that the respondent is to be placed in a position to enjoy the same standard of living as she has during the existence of the marriage ...
>
> [26] The learned judge had clearly taken into consideration the individual circumstances of both parties, the needs and responsibilities of the parties, the assets and the earning capacity of the appellant.

The Needs And Means Of The Petitioner

[13] What then are the needs of the petitioner? The petitioner did not give evidence and particulars of her monthly or weekly expenditure nor any evidence on the amount she requires to sustain herself, her lifestyle or the standard of living she has enjoyed before the breakdown of her marriage. In the circumstances the court is left with no evidence to support the petitioner's claim for maintenance for the sum of RM3,000.

[14] From the petitioner's and the respondent's testimonies, I can conclude that the petitioner's five children, who are adults and working, are close to the petitioner. It is not too far fetched therefore for me to conclude that the five children would be in the position to give the petitioner some money every month, even though this is denied by the petitioner (p. 18, Notes of Evidence). I find that the petitioner's testimony in many instances to be contradictory and untruthful and because of this I cannot accept her denial that all or any of her five children has given her money.

[15] Even though the petitioner has no job, it does not mean that she is without any means. This is because as part of the "deal" for the petitioner to allow the respondent to take SR2 as his "second wife", the petitioner took sole control of the finances and accounts and management of the respondent's so-called company under the style Nam Hin Motor Trading as from 1 March 1991 until 4 July 2007 (Q&A 4, 5, R2). This fact was admitted by the petitioner (Q&A 112, P1), even though in her pleadings the petitioner pleaded that the respondent's behaviour had obviously changed for the worse since being involved with a third party, meaning SR2, pinning the blame for the breakdown of her marriage on SR2/the respondent (para. 9 11(d), (e), (f), (g), (i), (k), (m), petition A). The petitioner's testimony contradicted her pleadings.

[16] At the time when the petitioner was in full control of the respondent's company, SR2 was working as a clerk with a salary of only RM350. Puan Mazida bt Mohamad (SR3) was also working as a clerk then. According to the testimony of SR2, which was corroborated by SR3, the daily cash collections were collected by SR3, who would then gave the collection to SR2. Everyday before the office closed, SR2 would put all the cash collected into an envelope and hand it to the petitioner. The testimonies of SR2 and SR3 were corroborated by the testimony of the petitioner herself (pp. 11, 12, Notes of Evidence). Despite being in total control of the respondent's company for a long period, the petitioner had allowed the respondent's company's account with OCBC Bank to be overdrawn by RM7,800 when the respondent's company had an overdraft of RM200,000. The respondent only knew of this state of affairs when a staff from OCBC Bank had called him with that information on the overdrawn account on 4 July 2005 (Q&A 5, R2). The respondent's testimony was corroborated by SR2 (Q&A 4, R3). The respondent and SR2 were not challenged by the petitioner on this matter during cross-examination. In view of this, I am in agreement with respondent's learned counsel's submission that the only logical conclusion is that the petitioner did not bank in the cash and daily collections and must have surreptitiously siphoned off the monies of the respondent's company until the company's financial problem surfaced in the form of the overdrawn account.

[17] As a result of her mismanagement, to say the least, of the respondent's company, the respondent replaced the petitioner with SR2, who then took full control of the company's finances and accounts, including the daily collections (Q&A 7, R2). According to the respondent, ever since her replacement by SR2 in the control of the finances and accounts of the company, the petitioner was angry, dissatisfied and sought every opportunity to quarrel with the respondent and SR2. This testimony of the respondent was again not challenged by the petitioner, and I therefore accept the respondent's testimony as being truthful.

[18] Over and above siphoning off the respondent's company's monies, the petitioner had admitted to having pocketed the commissions from the sale of insurance covers averaging RM30,000 a year that had rightfully belonged to the company seeing that she did not possess the Malaysian Insurance Association's Certificate (PIAM) to sell insurance. The certificates to sell insurance were those belonging to the respondent and SR2. Below are excerpts of the petitioner's answers during cross-examination which show her admission to having received RM30,000 a year insurance commissions for at least five years, which would be a total of RM150,000 at the very least.

Q & A 37, P1 dirujuk.

Q: Setujukah kamu tidak mempunyai sebarang sijil dari PIAM (Persatuan Insurans Malaysia) untuk menjual insurans?

A: Setuju.

Q: Kamu bukan seorang ejen insurans yang sah?

A: Saya hanya membuat kerja untuk syarikat Nam Hin/ responden.

Mahkamah: Menasihatkan kepada saksi tentang implikasi-implikasi terhadap keterangan yang diberinya sebagai saksi. Jika tidak menjawab dengan tepat soalan yang ditanya ianya boleh membawa implikasi beliau tidak mahu menjawab, atau berbohong di Mahkamah.

Q: Kamu kata kamu telah menerima komisyen insurans. Katakan penjualan insurans adalah di bawah sijil-sijil insurans milikan Puan Lee Miau Tan dan juga responden?

A: Betul.

A Q: Katakan komisyen-komisyen yang diterima/disimpan oleh kamu sebenarnya kepunyaan syarikat responden?

A: Betul.

Q: Setujukah purata setahun komisyen penjualan insurans yang
B diterima oleh kamu berjumlah RM30,000?

A: Betul.

Q: Setujukah kamu telah menyimpan komisyen yang diterima oleh kamu mulai tahun 1993 sehingga tahun 2007?

C

A: Tak betul.

Q: Berapa tahun yang kamu menerima komisyen itu?

A: Saya terima komisyen selama 5 tahun.

D

[19] There is also the fact that the petitioner owns a new Toyota Estima bearing registration number JLR 58 (p. 330, D) worth, according to the respondent's counsel's estimate, which I have no reason to doubt, more than RM250,000. As the petitioner failed to call her son to testify on her behalf, I therefore agree with
E respondent's learned counsel's submission that the petitioner had lied in court when she testified that her son had bought the said car for her. Her testimony, moreover, was in direct contradiction to her earlier testimony when she stated that her children never gave her any contribution of RM500 a month (p. 18, Notes of
F Evidence). It is not plausible for the children on one hand refusing to give the petitioner any money and yet for one of them to purchase a luxury car for her worth over RM200,000 on the other. This is yet another instance that I have found the petitioner's testimony to be lacking in probative value.

G

[20] In her witness statement, P1, answer 54, the petitioner claimed that she had contributed the sum of RM92,565 towards the purchase price of that land held under GM 235, Lot 600, Mukim Sungai Segamat, Daerah Segamat, Johor ("Land No. 1")
H bought by and held under the respondent's name on 29 April 2005 (pp. 39-56, C). She claimed that the said sum was from her savings (Q&A 60, P1). And yet the petitioner did not divulge any information in regard to any of her bank account/s. It is not plausible for the petitioner to have savings (allegedly) of that
I amount and not keep the same in a bank account.

[21] There is also the matter of a car bearing registration number WHU 7122 which the respondent had wanted to transfer the title of that car to the petitioner, but the petitioner had refused to accept the transfer even though the said car is used by her (p. 406, D; Q&A 47, R2).

[22] The respondent alleged in his answer 53, R2, that he had given a house at No. 4, Jalan Sri Makmur 5, Taman Sri Makmur, Kampung Tengah, 85000 Segamat, Johor and a workshop under the style of Nam Hin at No. 162-B, Batu 1 3/4, Jalan Buloh Kasap, 85000 Segamat. These two properties are in the petitioner's name. Even though the respondent had admitted that he did not provide the proof of his assertions the petitioner, however, never challenged the respondent on his assertions during cross-examination by putting it to the respondent that he had never given the two said properties to the petitioner. In view of this, I find that the respondent's assertions had been admitted to by the petitioner. Hence I also find that the petitioner is the owner of both properties.

[23] I have dealt with at some length on what I see as the means of the petitioner, despite her not having an "official" job. I have also noted that the petitioner had not only failed to give evidence on her monthly/weekly expenditure, she had also failed to make any disclosure of her financial status even though she must have a bank account at least (see the separation order). In as much as the petitioner had demanded the full and frank disclosure of the respondent's finances, likewise the same is demanded of her, seeing that she is certainly not a woman of straw. Based on her own testimony and the fact that despite having/earning quite large sums of money from the respondent's company, the respondent need not spend such sums at all since, by her own admission, she stated that all the household expenditure, food and necessities of the family were paid by the respondent (Q&A 36, P1). The petitioner's failure to make a frank and full disclosure of her financial status has compelled me to invoke the adverse inference against her under s. 114(g) of the Evidence Act 1950. The provisions of s. 114(g) is also invoked against the petitioner for failing to disclose the amount of RM30,000 she obtained through the sale of insurance covers; the two properties given to her by the respondent, and the car registration number WHU 7122 given to her for her use.

A **The Needs And Means Of The Respondent**

[24] The needs and means of the petitioner is to be compared with that of the respondent's. Nam Hin Motor Trading is the respondent's sole company wherein his total income is derived and his ability to pay maintenance to the petitioner is dependent on.

[25] The company's current account with Public Bank showed a sum of RM545,989.48 owing to the bank as at 31 October 2011 (p. 37, C) and a sum of RM325,136.66 as debt due and owing to the bank under a fixed loan as at 30 June 2011 (pp. 315-316, D). The company's trading, profit and loss account of years 2008, 2009 and 2010 (that is, after the respondent left the matrimonial home and after SR2 took over the financial affairs of the company) (at pp. 308-313, D) showed that the company had a net profit of RM63,885.42, RM31,909.15 and RM38,231.50 respectively, that is, a decreasing profit.

[26] Whilst the petitioner has only herself to maintain, the respondent has a young second family to maintain and support from his union with SR2. Out of SR2's five children there are only four surviving ones ranging in ages from 19 years, 17 years, 14 years to nine years (para. 8, p. 4, A). The four surviving children are still schooling and/or in college. The youngest daughter, Peh Mei Yuan, aged nine, is a disabled person/OKU as evidenced by her Kad OKU (R1). As such she needs special attention, needs and care (Q&A 52, R2).

[27] According to the respondent, he requires the sum of RM15,000 a month for his business and household expenditure the details being as follows (Q&A 55, R2):

(i) payment towards fixed loan to Public Bank ... RM4,058 per month (pp. 314-316, D);

(ii) interests on overdraft to Public ... between RM2,500-RM4,000 per month (pp. 15-38, C);

(iii) household expenditure and necessities ... RM5,000 per month;

(iv) insurance premium payments RM33,443 per year or RM2,786.92 per month (pp. 18-19, F).

[28] Having perused all the documents referred to, as well as the profit and loss accounts of the company for years 2008-2010, I accept the respondent's computation of his monthly expenditure as being reasonable in the circumstances and which does not include the RM3,000 interim maintenance he continues to pay the petitioner.

[29] The monthly estimated expenditure of the respondent, however, does not take into account on the vagaries of the business income of the respondent's company, for which this court must out of necessity and survival of the respondent's business take into account. After all, if the respondent's business fails, there will be no income coming in for the respondent to even pay the petitioner's maintenance let alone his household expenditure.

[30] I also find that the respondent, unlike the petitioner, had been forthcoming in disclosing his personal bank account statements to the petitioner's solicitors. He and SR2 had also given the petitioner's solicitor full written authority to write to any bank in Malaysia to ascertain their financial standing (pp. 376, 377). Even though in her witness statement answer 126, P1, the petitioner stated to question 126 that:

> 126. Adakah Puan Yap mensyaki Responden mempunyai akaun peribadi Responden yang tidak ditunjukkan dalam tindakan ini; dan sekiranya ditunjukkan, jumlah tersebut adalah untung bersih yang diperolehi Responden melalui perniagaan Nam Hin Motor Trading? Saya bukan mensyaki tetapi menyatakan ia adalah kenyataan yang benar kerana saya mengetahui Responden ada akaun peribadi yang tidak ditunjukkan dalam tindakan ini.

In direct contradiction to her said evidence she testified as follows during cross-examination (p. 17, Note of Evidence):

> Q&A 126, P1 dirujuk.
>
> Q: Kamu kata tadi peguam kamu telah menulis surat kepada bank-bank untuk mendapat maklumat tentang keadaan kewangan responden mengenai akaun peribadi responden. Apakah kedudukan kewangan responden setelah peguam kamu memperolehi?
>
> A: Responden ada simpanan wang di dalam beberapa buah bank. Ada kertas yang mengandungi jumlah wang dalam bank.

A D, muka surat 364 dirujuk.

Q: Adakah ini akaun responden yang didedahkan kepada kamu dan kepada mahkamah?

A: Betul.

B

Responsibility For Breakdown Of Marriage

[31] As for this aspect of the court's consideration in assessing the amount of maintenance, I am guided by the provisions of s. 78 of the Act and the decision of the Court of Appeal case of C *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721. In *Diana*'s case, it was held that the wife's claim for RM50,000 per month for maintenance for herself and her daughter was "on the high side, and she must realize that she too has a price to pay fo the breakdown of the marriage." The said D court awarded the wife the sum or RM25,000 for maintenance in the circumstances of her husband being a multi millionaire etc.

[32] In the case before me, the petitioner alleged that the respondent's illicit relationship with SR2 was one of the causes of E the breakdown of her marriage with the respondent. Again I find that the petitioner is not telling the truth. During cross-examination (p. 10, Notes of Evidence), the petitioner had admitted giving her consent and blessing to the respondent taking SR2 as his second wife. It must be remembered that the petitioner's marriage to the F respondent was in accordance with Chinese customary rites at a time when the Act was not in force yet. So in consenting to the respondent to take SR2 as his "wife", it would appear in her mind at least that the respondent had validly entered into a "second marriage", *albeit* not recognised under the Act. That being G the case, the petitioner after approving the "second marriage" cannot now fault the respondent for entering into the so-called illicit relationship with SR2. It is trite principle of law that one cannot approbate and reprobate something – see *Tan Hood Keng v. ARP Aroonasalam Chetty* [1912] 1 LNS 2; definition of H *"Approbate and Reprobate", Words, Phrases and Maxims Legally and Judicially Defined*, Vol. 2, by Anandan Krishna. The fact that the petitioner did not cite SR2 as the co-respondent to the petition is therefore significant to me.

I **[33]** Other than alleging the so-called illicit relationship between the respondent and SR2, the petitioner had not led any evidence to prove that the respondent had caused the marriage to

breakdown. Her witness statement dealt largely on the allegedly matrimonial properties and the reasons why she is entitled to half of the matrimonial properties.

[34] On the other hand, the respondent led evidence to show how the petitioner had begun to act irresponsibly towards the respondent's company until the company had overdrawn its overdraft account which then forced the respondent to ask SR2, who works as a clerk in the company in the first place, to take over the charge of the company's financial affairs. This turn of affairs then led the petitioner to ill treat SR2 with contempt and deliberately sought to quarrel with SR2 and the respondent (Q&A 17, R2; Q&A 5, R3). The respondent further gave evidence that (Q&A 9, R2):

> 9S Pempetisyen telah menyatakan bahawa perbuatan salah kamu telah menyebabkan keretakan perkahwinan kamu. Apakah komen kamu?
>
> J Saya menyatakan bahawa tingkah laku pempetisyen yang telah menyebabkan perkahwinan kami pecah belah dengan tidak dapat dipulihkan. Pada 23.10.2006, ibu saya telah datang ke kedai baru dan menolong Lee Miau Tan (SR2) memasak di dapur. Apabila pempetisyen lihat keadaan tersebut, beliau terasa cemburu dengan mengeluarkan kata-kata yang kasar menyebabkan ibu saya bertengkar mulut dengannya. Dalam pertengkaran itu, anak pempetisyen, Peh Ching Keong telah menolak ibu saya menyebabkan beliau jatuh. Ibu saya terpaksa dirawat dan diwadkan di hospital Segamat. Saya terasa kecewa dengan tingkah laku pempetisyen dan anaknya terhadap ibu saya yang telah uzur.
>
> Pada tahun 2007, sebelum tahun baru Cina, di atas permintaan pempetisyen, saya telah memberi wang sejumlah RM7,500 kepadanya untuk merayakan Tahun Baru Cina. Pada 27.2.2007, pempetisyen telah menyalahkan saya kerana saya tidak memberi "ang pau" kepada anak-anak dan cucu-cucunya. Saya tidak mampu memberi wang lagi kerana perniagaan saya semakin merosot dan mata pencarian semakin susah akibat kemerosotan teruk ekonomi yang sedang melanda Malaysia pada masa itu.
>
> Tindakan pempetisyen yang mendesak dan tidak munasabah telah menyebabkan pertengkaran antara pempetisyen dan saya.

A The evidence given by the respondent and SR2 was not challenged by the petitioner and therefore to be regarded as true.

[35] In view of the matters referred in paras. 31 to 34 above, I find that the petitioner is solely responsible for the breakdown
B of the marriage and for that she has to pay.

Assessment Of Maintenance

[36] Having considered all the matters above I am of the view that the sum of RM1,500 a month is a reasonable sum for the
C maintenance of the petitioner. This sum shall be paid to the petitioner beginning from 1 November 2012 and this order shall supercede the separation order.

Division Of Matrimonial Assets

D

[37] The petitioner claims that she is entitled to half share of the following properties acquired/previously acquired by the respondent:

(i) GM 235 Lot 600 Mukim Sg. Segamat, Daerah Segamat,
E Johor ("Land No. 1");

(ii) HS(M) 669, PT No. MLO 2698, Mukim Sg. Segamat, Tempat Jalan Buluh Kasap, Daerah Segamat, Johor ("Land No. 2");

F

(iii) PLO 35, No. 90, Kawasan Perindustrian Jalan Genuang, Segamat, Johor HS(D)16739 Lot PTD 4793, Mukim Sg. Segamat ("Land No. 3");

(iv) QT(M) 13, Lot 1088, Mukim Jabi, Daerah Segamat, Johor
G ("Land No. 4").

[38] The petitioner contends that as these properties were acquired by the respondent during their marriage, and as she had helped the respondent to bring up his children by her, helped in
H the respondent's company and had even contributed some sums of money to one purchase (Land No. 1), she had therefore contributed to the purchase of the said properties entitling her to half share of these properties.

I

[39] For the purpose of considering this issue, reference must be made to the provisions of s. 76 of the Act. For ease of reference I reproduce the said section as follows:

76. Power for court to order division of matrimonial assets.

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

(2) In exercising the power conferred by subsection (1) the court shall have regard to:

(a) the extent of the contributions made by each party in money, property or work towards the acquiring of the assets;

(b) any debts owing by either party which were contracted for their joint benefit;

(c) the needs of the minor children, if any, of the marriage; and subject to those considerations, the court shall incline towards equality of division.

(3) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

(4) In exercising the power conferred by subsection (3) the court shall have regard to:

(a) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring the family;

(b) the needs of the minor children, if any, of the marriage; and subject to those considerations, the court may divide the assets or the proceeds of sale in such proportions as the court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts.

[40] Before I proceed to consider the details pertaining the acquisition of these properties by the respondent, some facts need to be clarified with regard to the formation of the respondent's company. Before the respondent's company Nam Hin Motor Trading came to being, a firm going by the name of Chop Nam Heng was established by the respondent's father, Peh Kim Fong, since 23 November 1964 (C, pp. 1-3). From 30 March 1977, Chop Nam Heng became a partnership and was owned by the respondent and his brother, Peh Tai Meng) (C, pp. 5-8). Then on 28 February 1989, the respondent and his brother, Peh Kong Siong, set up another partnership under the style Nam Hin Motor Trading (pp. 9 11, C). Subsequently, Nam Hin Motor Trading became a sole proprietorship of the respondent's when his brother withdrew on 1 March 1990 (pp. 13-14(b), C).

Land No. 3

[41] As the respondent submitted that land no. 3 was not acquired during the marriage, and therefore did not form part of the matrimonial assets, I will deal with it first. According to the respondent, on 6 December 1989, the respondent's late father had purchased land no. 3 and registered it in the names of the respondent and his elder brother, Peh Tai Meng. Subsequently, Peh Tai Meng transferred his undivided half share of land no. 3 to the respondent on 16 August 1991 in consideration of love and affection (Form 14A, pp. 385 388, D), which was admitted by the petitioner (p. 18, Notes of Evidence). The respondent therefore submitted that the petitioner's allegation that land no. 3 was purchased by the respondent was baseless as the respondent was only 21 years of age in 1978 and not married to the respondent then. Learned counsel for the respondent had got the dates mixed up. If it was true the respondent's father had bought the land and registered it in both the respondent's his brother's name in equal shares, that was in 1989, and comparing it with the date of birth of the respondent, the respondent would have been 32 years of age in 1989 and would have already been married to the petitioner for about 11 years.

[42] Aside the error made by the respondent's learned counsel, I still cannot accept the respondent's evidence that his late father was the one who bought land no. 3 for his two sons. This was because the respondent's evidence contradicted the documentary

proof tendered by the petitioner herself in the form of payment receipts on pp. 398-404, D. The payment receipts showed the payments were made by:

(i) "Chop Nam Heng", receipts dated 22 November 1978, 6 June 1978 (pp. 398, 404, D);

(ii) the respondent himself, receipts dated 21 November 1983, 29 August 1983 (pp. 399, 400, D);

(iii) the respondent/Peh Thy Meng & Peh Tai Meng (respondant's brother), receipts dated 20 July 1983, 20 June 1983, 24 May 1983 (pp. 401, 402, 403, D).

Between the dates 1978 till 1983 of the receipts, Chop Nam Heng was a partnership between the respondent and his brother, Peh Tai Meng, As other documentary proof had not been tendered, such as the file search from the land office, and since the respondent admitted that the land no. 3 was owned equally by him and his brother when it was bought whether in 1978 or in 1989, I find that the half share belonging to the respondent was bought during the marriage. However, at that point in time the petitioner was very much a housewife, bearing the respondent's children and taking care of his household needs. That must account of something. The petitioner had not taken control of Chop Nam Heng's financial affairs and had therefore not contributed directly to the acquisition of land no. 3.

[43] Land no. 3 was sold for RM290,000 *vide* the Sale and Purchase Agreement dated 3 April 2006 (pp. 294-305, D), out of the proceeds of which the respondent had to pay RM200,000 to OCBC Bank to settle the redemption sum (p. 306, D). There was a surplus of RM90,000 for which the respondent had not given the petitioner her share of the proceeds. I award the petitioner for her indirect contribution to the respondent/Chop Nam Heng the sum of RM22,500, being the half share of the respondents share of land no. 3. The petitioner is not entitled to the other half share of land no, 3 which was given to the respondent by his brother.

Land No. 1

[44] The respondent purchased land no. 1 *vide* a Sale & Purchase Agreement dated 29 April 2005 for the sum of RM833,085 (Q&A 11, R2; pp. 39-55, C). The respondent took a loan of RM600,000 from OCBC Bank in order to purchase the

A said land. According to the respondent, he borrowed a sum of RM60,000 from his mother as the petitioner refused to lend it to him (p. 56, C). His evidence was not challenged by the petitioner.

[45] When the respondent's business had financial difficulties, the
B respondent had to charge land no. 1 to Public Bank in order to obtain a loan of RM1.2 million in November 2006 for his company's use. The loan sum was made up of an overdraft facility of RM750,000 and a fixed loan of RM450,000. At the same time the respondent had sold land no. 3 (Q&A 17, R2; pp. 83-186,
C C).

[46] As of 27 November 2006, the respondent had to settle the loan sum/redemption sum of RM569,000.40 (p. 7, F), for which he has to pay a sum of RM4,058 per month in respect of the fixed loan, and a sum of about RM4,000 per month in respect of
D the overdraft (pp. 314-316, 15-38, C).

[47] In view of these circumstances, and the fact that the petitioner had secretly siphoned off the company's funds for her own use and without the knowledge of the respondent, it was
E submitted by learned counsel for the respondent that land no. 1 was acquired through the sole effort of the respondent and therefore the petitioner should not be entitled to share in the proceeds of the said land.

F **[48]** On her part, the petitioner alleged that land no. 1 was purchased at the purchase price of RM925,650, which sum was not stated in the Sale and Purchase Agreement dated 29 April 2005. Even though the true price was not stated in the Sale and Purchase Agreement it was agreed between the respondent and
G the purchaser that an additional sum of RM92,565 be paid directly to a member of the purchaser's family. At the respondent's request, the petitioner had paid the sum of RM92,565 towards the purchase of land no. 1. She paid to one Sia Beng Soon @ Sia Beng Sun, as commission *vide* a cashier's order (p. 396, D).
H The petitioner also alleged that there were calculation being noted down by SR2 which verified her allegations of this extra payment being made by her as contained on pp. 1-2, E.

[49] Therefore, it was submitted by learned counsel for the
I petitioner that land no. 1 is part of the matrimonial assets and she is entitled to half share of the same.

[50] I am unable to accept the testimony of the petitioner that she had contributed the sum of RM92,565 to pay one Sia Beng Soon @ Sia Beng Sun as commission towards the purchase of land no. 1. She alleged that the document on pp. 1-2 of E was written by SR2, and yet SR2 was never cross-examined on the same. Her allegation that the true purchase price was RM925,650 did not hold water in view of the provisions of the Sale and Purchase Agreement dated 29 April 2005 which clearly stated the purchase price was RM833,085. On the balance of probabilities, I am inclined to believe the version as laid out by the respondent to that by the petitioner. As I have made a finding of fact earlier, that the petitioner had been siphoning off monies from the company, it stood to reason that she was in a strong financial position that had even caused the respondent to request financial assistance from her to purchase land no. 1, and which she refused to do so. The said land, moreover, is now encumbered by loans taken out by the respondent towards his business dealings. The respondent has encountered financial difficulties as a result of the petitioner's own selfish actions. In the circumstances, I am of the view that land no. 1 was acquired by the respondent by his sole effort and that the petitioner is precluded from sharing in its acquisition. It is most revealing to me the true nature of the petitioner who is only interested in obtaining as much benefits as she can under this petition *vis* the matrimonial assets, but is unprepared to shoulder any of the respondent's liabilities in respect the company. She had this to say in that regard (p. 18, notes of Evidence):

> Q&A 134, P1 dirujuk.
>
> Q: Kalau bank-bank syarikat Respondent menunjukkan overdraft, adakah kamu setuju membayar 50:50?
>
> A: Tidak setuju.

Land No. 2

[51] Land no. 2 comprises of a 4-storey building. It ws purchased by the respondent in Jun 2004 at a purchase price of RM380,000 (pp. 8-11, F). In order to purchase land no. 2, the respondent took a loan of RM300,000 from OCBC Bank (pp. 187-212, C).

[52] On 3 September 2007, the respondent charged land no. 2 to Public Bank for a loan of RM500,000 (D, pp. 213-254). Before he could charge it to Public Bank, the respondent had to settle the redemption sum of RM406,000 to OCBC Bank (pp. 12-13, F).

[53] The respondent sold land no. 2 *vide* a Sale and Purchase Agreement dated 15 August 2009 for the sum of RM600,000 (D, pp. 255-266; Q&A 32, R2). The respondent had to settle the redemption sum of RM474,868.71 to Public Bank (pp. 14-15, F). Over and above having to pay the redemption sum, the respondent had to pay a sum of RM80,000 to his son for vacating the said land. After deducting these payments, there was a surplus of RM45,000 excluding expenses (Q&A 36, R2, Q&A 5, P1).

[54] Again it is the respondent's contention that land no. 2 was acquired through the sole effort of the respondent and due to her own conduct of siphoning off the company's monies, the petitioner is not entitled to a share of the balance of the sale price.

[55] On her part, the petitioner claimed that she had contributed to the business of the company as alluded to earlier. That since part of the money that was used by the respondent to purchase land no. 2 came from the company, the petitioner submitted on the authorities of the Court of Appeal case *Ching Seng Woah @ Cheng Song Huat v. Lim Shook Lin (F)* [1997] 1 CLJ 375 and *Sivanes Rajaratnam v. Usha Rani Subramaniam* [2002] 3 CLJ 300, and s. 76 of the Act, that she is entitled to share in the proceeds.

[56] In view of the fact that land no. 2 was purchased at a period of time when the petitioner was actively handling all the financial affairs of the company to her benefit, she had already helped herself to the fruits of the company for her so-called contribution to the company. As such I find that the respondent had solely acquired land no. 2 by his sole effort and that the petitioner is precluded from enjoying any share of the balance of the RM45,000.

Land No. 4

[57] The respondent had purchased land no. 4 *vide* the Sale and Purchase Agreement dated 1 December 2004 for the sum of RM20,000 (pp. 321-329, D). Both parties made the same submission as in lands nos 1-3. For the similar reasons I have enumerated in respect of lands nos 1-2 above, I also find that the

respondent had solely acquired land no. 4 seeing that the petitioner had helped herself to the company's funds without the knowledge of the respondent and thereby had obtained her share of the company's proceeds. She is therefore not entitled to claim half share of land no. 4.

Generally

[58] Other than the above considerations, I have also taken into account the fact that whilst the petitioner is no longer encumbered by having children underage to take care of, the same cannot be said of the respondent. The respondent has four underage children, with the youngest being a disabled child needing special care and attention.

[59] Further, even though the respondent had not demanded the petitioner to declare the two properties at No. 3, Jalan Sri Makmur 5, Taman Sri Makmur, Kg Tengah, 85000 Segamat, Johor and at No. 162-B, Batu 1 3/4, Jalan Buloh Kasap, 85000 Segamat to be those given to her by him during the marriage it behoves on the petitioner to plead these properties as being part of the matrimonial assets. Her failure to do so further illustrates her duplicity in the affairs between her and the respondent. It is a case of what is sauce for the goose, that is, the petitioner is not the sauce for the gander, that is, the respondent.

Monies In Bank

[60] For the same reasons as in the division of the matrimonial assets, it was submitted by the petitioner that she is entitled to half share of all the respondent's monies held in his bank accounts. I similarly reject the petitioner's claim to these monies as they are monies earned by the respondent by his own efforts and with which he has to not only support his second young family, but also to finance the loans he has taken in order to maintain the viability of his company. It is most unreasonable of the petitioner to demand her so-called half share of the monies but at the same time is not prepared to bear her half share of the liabilities incurred as I have referred to before this. She further had failed to divulge her own bank accounts.

RM5,000 Per Year For Chinese New Year

[61] The petitioner made this claim on the basis that since their marriage, every year the respondent would pay her RM6,000 until up to 2006. Thereafter the respondent paid her RM5,000 a year

A from 2007 till 2009. The petitioner's learned counsel referred to the Court of Appeal case of *Koay Cheng Eng v. Linda Herawati Santos (supra)* for the principle of law that the petitioner is to be placed in the position to enjoy the same standard of living as she had during the existence of the marriage.

B

[62] It was also submitted that the petitioner had enslaved herself to the respondent and their family and the respondent's business all these years, so much so that she did not work outside the respondent's business.

C

[63] For the respondent, it was submitted by learned counsel that after the divorce there would be a clean break between the parties and therefore there would no longer be any celebration together. Further, the petitioner's five children are all grown up and working and as such they would not be receiving any "ang pow" from her.

D

[64] I wish to distinguish the facts of the case of *Koay Cheng Eng (supra)* from the facts of this case. In K*oay Cheng Eng*'s case, the ratio of the Court of Appeal's decision pertains to the issue of the amount of maintenance due to the respondent wife. In this

E case, the payment of the said RM5,000 per annum is in addition to the maintenance payable to the petitioner. The question therefore arises whether the said RM5,000 payment is necessary for the lifestyle of the petitioner. I think not. To me such payment would be understandable, but not necessary, if the

F petitioner and the respondent remain married and celebrate the Lunar New Year together. Upon their divorce I see no reason why the respondent be compelled to make such payment to the petitioner seeing that he has another household to take care of. The petitioner is very well aware of this household and which, as

G I have alluded to earlier, had the petitioner's blessings in the first place until matters developed incurring the petitioner's wrath against that union/household.

[65] Moreover, the respondent had admittedly ceased paying the

H petitioner the said amount after he was forced to leave the matrimonial home due to the intransigence of the petitioner referred to earlier in the year 2007 and subsequently in 2010 he ceased altogether to make the said payment to the petitioner. Thus, the petitioner cannot claim that she had been receiving

I these payments continuously up to the date of the petition. Moreover, in the separation order this annual payment was never claimed nor agreed by the parties.

[66] I therefore disallow this claim of the petitioner's.

Conclusion

[67] For the reason I have adumbrated above, I do hereby make the following orders:

(i) prayer 15(a) of the petitioner's petition and prayer 13(a) of the respondent's counter petition are allowed;

(ii) the respondent shall pay the sum of RM1,500 a month as maintenance of the petitioner beginning from 1 November 2012, and this order shall supercede the separation order;

(iii) the respondent shall pay the sum of RM22,500 to the petitioner as the petitioner's share of the matrimonial property known as land no. 3;

(iv) the petitioner's claim to half share of properties known as land no. 1, 2 and 4 is dismissed;

(v) the petitioner's claim to half share of the respondent's monies in banks is dismissed;

(vi) the petitioner's claim of RM5,000 per year for Chinese New Year celebration is dismissed;

(vii) no order as to costs.